No. 17-571

IN THE

Supreme Court of the United States

FOURTH ESTATE PUBLIC BENEFIT CORPORATION,
Petitioner,

v.

WALL-STREET.COM, LLC and JERROLD D. BURDEN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, RECORDING INDUSTRY ASSOCIATION OF AMERICA, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, BROADCAST MUSIC, INC., NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, AND SONGWRITERS OF NORTH AMERICA, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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September 4, 2018

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae the National Music Publishers' Association, the Recording Industry Association of America, the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., Nashville Songwriters' Association International, and Songwriters of North America are leading music trade organizations and performing rights societies representing the interests of music publishers, record companies, and individual songwriters and composers. *Amici*'s members, who collectively register tens of thousands of musical works and sound recordings each year with the Copyright Office, have a substantial interest in this case because their copyrighted works are the foundation of their businesses and source of livelihood for individuals who create them. *Amici*'s members depend upon the rights conferred by the Copyright Act—including the right to seek injunctive relief and obtain damages for the unauthorized use of their musical works and sound recordings—to protect the works they create, invest in, license, and distribute.[2]

The question presented in this case bears directly on that interest. The rule advocated by Respondents

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[1] No party or counsel for any party authored any part of this brief or made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided blanket consent to the filing of *amicus* briefs.

[2] *Amici* work on behalf of music publishers, record labels, songwriters, and composers to protect, promote, and advance their interests on legislative, litigation, and regulatory matters. The Appendix to this brief provides more detailed descriptions of *Amici*.

and adopted by the Eleventh Circuit below would prohibit a copyright owner from seeking injunctive or other relief until the Copyright Office determines whether to issue a copyright certificate. Under that rule, a copyright owner could not enforce its exclusive rights against ongoing infringement even though the owner has met its statutory obligation to deliver to the Office the work at issue, the application, and the required fee, at which time the Copyright Act deems a copyright registration to be effective. Moreover, Respondents' rule would disable copyright owners' enforcement rights in this way even though the Copyright Act allows an owner to sue regardless of whether the Copyright Office issues a registration certificate.

The Copyright Office operates with a limited budget, staffing, and resources. The Office acknowledges that it typically takes seven to nine months, and sometimes more than two years, for a copyright owner to receive a copyright certificate. In the experience of *Amici*'s members, the delay can be even longer and in some instances may consume most or all of the Copyright Act's three-year limitations period, thereby eliminating altogether a copyright owner's ability to bring an infringement action. Moreover, as also recognized by the Office, the general trend in recent years is that processing times are increasing.

The regime for which Respondents advocate would have a devastating effect on *Amici*'s members and others in the broader music industry, who at least now may be able to bring suit without undue delay in one of the jurisdictions that takes the opposite view. Particularly in the case of recently released songs at the peak of their earning potential, it is critical to be able

to seek prompt judicial intervention against unauthorized uses. Accordingly, *Amici* respectfully submit that the Court should reject Respondents' misguided rule and confirm that a copyright owner may file an action against an infringer once the owner has made registration for the work by depositing the work, along with the application and fee, with the Copyright Office, as Congress intended—and as the Copyright Act, correctly read, provides.

SUMMARY OF ARGUMENT

I. Copyright protection attaches to original works the moment they are fixed in a tangible medium, and does not depend on action by the Copyright Office. Copyrights are not self-enforcing, however, and copyright owners must turn to the courts to enforce their statutory rights. The ability to sue for infringement and obtain injunctive relief is the central statutory mechanism by which the Copyright Act's substantive protection of exclusivity is enforced. Without that ability, a copyright is "of no value." *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 39-40 (1939).

Section 411(a) of the Copyright Act is meant to ensure that copyright owners can stop infringement of their works without delay. Section 411(a) permits owners to file an infringement action as soon as "registration ... has been made," and section 408 in turn provides that an owner "may obtain registration" by delivering the required deposit copies of the work, an application, and a fee to the Copyright Office. Surrounding statutory provisions demonstrate that registration is "made" under section 411(a) by the copyright owner such that the owner may sue for

infringement as soon as the owner fulfills section 408's registration requirements, rather than needing to wait for action by the Copyright Office as Respondents contend. For example, section 410(d) makes registration effective on the date when an acceptable deposit of the work, application, and fee are received by the Copyright Office, as determined by the Office or by a court; section 411(a) authorizes copyright owners to sue for infringement whether or not the Copyright Office issues a certificate; and section 411(c) provides added protections when "the *copyright owner* ... *makes registration* for the work." 17 U.S.C. § 411(c) (emphasis added). Congress made other rights, such as entitlement to *prima facie* validity of a copyright, expressly contingent on the Copyright Office's issuance of a certificate, but did not do so in section 411(a). Respondents' attempt to rely, instead, on the Act's preregistration and live-broadcast provisions, *see* 17 U.S.C. §§ 408(f), 411(c), is without merit because that argument fails to account for significant limitations on those procedures.

II. The statutory purpose and legal backdrop against which Congress enacted section 411(a) as part of the Copyright Act of 1976 confirm that Congress intended that copyright owners be able to obtain timely judicial enforcement, including injunctions against ongoing infringers. This Court has long recognized the significance of judicial enforcement to protect copyrights and declared that "forfeiture[]" of a copyright owner's right to sue is "never to be inferred from doubtful language." *Washingtonian*, 306 U.S. at 42. Moreover, Congress designed section 411(a) to overturn, in particular, the rationale of some lower courts

that had required a copyright owner to obtain a certificate from the Register, through mandamus if necessary, before suing for infringement.

III. The Court should reject Respondents' contention that a copyright owner cannot file an infringement suit until the Copyright Office issues a certificate or refuses to do so. There is often a significant time lag between when a copyright owner deposits the required copies of the work, application, and fee to fulfill the registration requirements, and when the Copyright Office issues a certificate or determines that it will not do so. The Office faces human and technological constraints, and acknowledges that administrative delay is typically seven to nine months and can be more than two years in some instances.

Amici's members experience these delays firsthand. In the experience of *Amici*'s members, delays of a year or more are not uncommon, and the processing time for some musical works and sound recordings is so long that it exceeds the Copyright Act's three-year limitations period for infringement suits. As a result, under Respondents' rule, copyright owners would be denied their right to enforce their copyrights against infringers for extended periods, and in some cases would lose the ability to do so altogether. A nonstatutory "special handling" procedure offered by the Copyright Office is no answer because its availability is discretionary, costs hundreds of dollars, and there is no guaranteed turnaround time.

Congress had no reason to expose copyright owners to that sort of legal limbo. On the contrary, its goal in drafting the 1976 Act was to preserve copyright

owners' ability to enforce their statutory rights in a timely manner through judicial intervention against infringers.

ARGUMENT

I. A COPYRIGHT OWNER THAT COMPLIES WITH THE REGISTRATION REQUIREMENTS OF THE COPYRIGHT ACT IS ENTITLED TO SEEK TIMELY INJUNCTIVE AND OTHER RELIEF IN COURT

A. The Ability To Seek Judicial Relief Against Infringers Is An Essential Feature Of The U.S. Copyright System That Congress Did Not Intend To Diminish Based On Administrative Delay.

Copyright attaches to original works the moment they are fixed in a tangible medium, 17 U.S.C. § 102(a), and not as a consequence of any certificate issued by the Copyright Office, *see id.* § 408(a) ("[R]egistration is not a condition of copyright protection"). But copyrights are not self-enforcing. Because copyright owners must sue for infringement to enforce their exclusive statutory rights, the ability to take legal action is the central statutory mechanism by which the Act's substantive protections are enforced. Indeed, as this Court observed nearly 80 years ago in *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 39-40 (1939), a copyright is of "no value" to its owner if it cannot be effectively enforced in the courts. That principle is particularly true where a work is subject to significant ongoing infringement, as is often the case with newly released recordings in the online

environment. Without the ability to obtain prompt injunctive relief against infringers in such a circumstance, a copyright owner cannot meaningfully enforce its property rights. *See* Part III.B, *infra*.

Section 501(b) of the Copyright Act provides that a copyright owner "is entitled, subject to the requirements of section 411, to institute an action for any infringement of" the owner's rights. 17 U.S.C. § 501(b). Section 411(a), in turn, provides that an infringement suit may be instituted by the owner of a United States work[3] after "preregistration or registration of the copyright claim has been made in accordance with [title 17]." *Id.* § 411(a).[4]

Respondents maintain that a copyright owner's ability to obtain judicial relief, including an injunction to halt ongoing infringement, must await definitive action by the Copyright Office even when the copyright owner has satisfied the requirements for registration. But the text, structure, and purpose of the Copyright Act do not support that interpretation.

The Copyright Act provides that the effective date of a copyright registration is the date on which "an application, deposit [of copy or copies], and fee, which are

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[3] The copyright owner of a non-U.S. work is not required to register before commencing a legal action. *See* 17 U.S.C. § 411(a) (limiting restriction to "action[s] for infringement of the copyright in any United States work"). As a result, under Respondents' rule, the owners of U.S. works would face significant delays as compared to owners of foreign works in enforcing their rights.

[4] The preregistration procedure, which applies only to incomplete, unpublished works still being "prepared for commercial distribution," 17 U.S.C. § 408(f), is not at issue in this case.

later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration," are received by the Copyright Office. 17 U.S.C. § 410(d). Under this statutory framework, then, either the Copyright Office or a court may make a determination concerning the acceptability of the materials submitted to the Office for registration, with the effective date of the registration being the date as of which compliant materials were received by the Copyright Office.

As this structure and provision for the effective date of registration demonstrate, Congress designed section 410(d) to account for the possibility of refusal as well as "the inevitable timelag" between the copyright owner's fulfillment of registration requirements and the Copyright Office's issuance of a certificate. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 157 (1976). Because Congress acknowledged the delay and took steps in section 410(d) to alleviate any adverse impact that delay could have on a copyright owner, it would contravene Congress's intent to read in a requirement that would restrict a copyright owner's enforcement rights based on the very administrative delay Congress sought to overcome. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("all parts" of a statute should be read together as a "harmonious whole").

Within this framework, the provision of section 411(a) that an infringement action may be instituted once "registration ... has been made" is best understood as referring to action by the copyright owner—i.e., the owner's having fulfilled the requirements for

making registration by depositing the work, and submitting an application and appropriate fee to the Copyright Office. *See* 17 U.S.C. § 408 (owner may obtain registration by delivering such materials to Copyright Office). The House and Senate Judiciary Committee reports accompanying the 1976 Copyright Act both confirm that under section 411(a), a copyright owner "cannot enforce his rights in the courts until *he has made registration*." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 157 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess., at 139 (1975) (emphasis added). The reports thus plainly indicate that the registration requirement of 411(a) is a responsibility imposed on the copyright owner—not the Copyright Office.

Section 411(a)'s text reflects that approach by affirming a copyright owner's right to sue for infringement notwithstanding the Copyright Office's refusal of registration. Section 411(a) requires that a copyright owner that chooses to proceed in this manner provide notice of the suit to the Register of Copyrights. Section 411(a) does not, however, specify that action by the Copyright Office one way or another is a prerequisite to suit. Nor does it mandate—as Congress could easily have done—that absent a refusal, a certificate of registration is required to sue. Instead, Congress empowered "court[s] of competent jurisdiction" overseeing infringement actions to determine the acceptability of the "application, deposit, and fee" and to confirm a copyright owner's ability to sue as necessary. 17 U.S.C. § 410(d).

In marked contrast to section 411(a), section 410(c) provides that, in certain circumstances, "a certificate

of registration" from the Copyright Office "shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate" in an infringement action. 17 U.S.C. § 410(c). While a certificate can thus provide a copyright owner some benefit in litigation, there is no *requirement* that the copyright owner obtain and submit a certificate, or be denied a certificate, before the owner can *file* the suit. Indeed, section 410(c) is compelling proof that, if Congress had intended to require a plaintiff to produce a certificate of registration to sue under section 411(a), it knew how to draft a statute containing such a requirement.

B. Surrounding Provisions Of The Copyright Act Confirm That Registration Is "Made" Under Section 411(a) When A Copyright Owner Delivers The Required Deposit Of The Work And Other Registration Materials To The Copyright Office.

1. Copyright registration is governed as a general matter by section 408 of the Copyright Act, which provides that "the owner of copyright or of any exclusive right in the work *may obtain registration* of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708." 17 U.S.C. § 408(a) (emphasis added). This language indicates that a copyright owner makes registration of a work by satisfying three criteria. *First*, the owner must deposit the required copies of the subject work with the Copyright Office, as determined by section 408(b) and regulations thereunder. *See id.* § 408(b).

Second, the owner must file a registration application that provides basic information about the work, such as the name and address of the claimant, the title of the work, and year in which the work was completed. *See id.* § 409. *Third*, the owner must pay the Copyright Office the appropriate registration fee. *See id.* § 708(a)(1); 37 C.F.R. § 201.3.

Section 408(a) speaks in terms of a copyright owner's "obtain[ing]" registration of a work by fulfilling the three requirements, and the interaction of section 408 with section 405(b) shows that registration is "made" in that manner. Section 405(b) immunizes a narrowly defined class of "innocent" infringers from liability for actual or statutory damages. 17 U.S.C. § 405(b). That immunity is limited, however, to "infringing acts committed before receiving actual notice that registration for the work has been made under section 408." *Id.* Section 405(b) thus uses the same syntax as section 411(a)—registration "has been made"—and links that process to section 408, which, as noted, permits copyright owners to obtain registration by depositing copies of the work, filing an application, and paying a fee. That linkage is strong evidence that registration is "made" in the same way for purposes of section 411(a)—i.e., by the copyright owner rather than the Copyright Office.[5]

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[5] Petitioner's reading of the Copyright Act is consistent with Congress's use of similar language in other statutes to indicate that registration is "made" by filing a document with a government agency or official. For example, 2 U.S.C. § 505 requires United States Senators to "register quarterly with the Secretary of the

Section 408(c)(3) provides additional support for this reading. Section 408(c)(3) explains that "a single renewal registration" for a pre-1978 work "*may be made* for a group of works by the same individual author ... *upon the filing of a single application and fee.*" 17 U.S.C. § 408(c)(3) (emphases added). A copyright owner files an application and pays the fee, such that registration under this provision is "made" by the copyright owner—just as the owner makes registration under section 411(a) by delivering to the Copyright Office the work at issue, an application, and the appropriate fee.

Another subsection of section 411 regarding registration and civil infringement actions further confirms Petitioner's reading of subsection (a). Section 411(c) permits a copyright owner to file suit against an infringer for a work "consisting of sounds, images, or both" that is fixed simultaneously with transmission if, among other things, "*the copyright owner ... makes registration for the work*, if required by subsection (a), within three months after its first transmission." 17 U.S.C. § 411(c) (emphasis added). This provision expressly designates the copyright owner as the party that "makes registration," without

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Senate" their dissemination of "mass mailings" using the franking privilege. "Such registration shall be made by filing with the Secretary a copy of the matter mailed and" additional information regarding the mailing. *Id.* In other words, the Senator, not the Secretary, "makes" registration. Other statutes likewise speak of "registration" being "made" by the submitting party rather than the recipient. *See, e.g.*, 15 U.S.C. § 1173(a)(4) ("[R]egistration is made" by persons engaged in manufacturing, buying, repairing, and selling "gambling device[s]."); 45 U.S.C. § 362(i) ("[R]egistration is made" by unemployed railroad employees.)

referring to action by the Copyright Office. Moreover, section 411(c) cross-references section 411(a) immediately after, indicating that "the copyright owner ... makes registration for the work," thus offering additional clear proof that Congress intended that the copyright owner, and not the Copyright Office, "makes registration" under section 411(a).

Section 412, as well, employs the phrase "registration is made" to identify action taken by the copyright owner. Section 412 limits the remedies available in infringement suits in some circumstances; it mandates that a court may not award statutory damages or attorney's fees for any infringement that "commenced after first publication of the work and before the effective date of its registration, unless such *registration is made* within three months after the first publication of the work." *Id.* § 412(2) (emphasis added). Apart from negating the right to bring timely action to address infringement, to say that "registration is made" only after the Copyright Office issues a certificate would undermine the ability of a copyright owner to seek statutory damages and attorneys' fees even when the owner has promptly submitted its registration materials upon publication—directly contrary to Congress' design.

2. Respondents' suggestion that section 408(f)'s preregistration provision and section 411(c)'s live broadcast provision mitigate the severe consequences of their statutory interpretation is misleading and not borne out by experience.

Section 408(f) permits preregistration of certain categories of unpublished works in the Register's discretion while the works are "being prepared for commercial distribution." Section 411(c) authorizes injunctive relief in the case of live broadcasts that are fixed simultaneously with transmission. These provisions exclude finished and published works, which account for the vast majority of works that copyright owners seek to register, from their specialized procedures. Notably, only a tiny fraction—0.17 percent—of all registrations processed by the Copyright Office in 2017 were preregistrations. *See* U.S. Copyright Office, Fiscal 2017 Annual Report, https://www.copyright.gov/reports/annual/2017/ar2017.pdf. Moreover, both provisions are conditioned upon follow-up registration by the copyright owner. Indeed, section 411(c) requires that the owner "mak[e] registration for the work, if required by subsection (a), within three months after its first transmission." 17 U.S.C. § 411(c). Under Respondents' reading of the statute, it is unlikely that an owner could successfully "make registration" within the three-month window given the current lag time at the Copyright Office. *See* Part III.A, *infra*.

II. IN ENACTING SECTION 411(a), CONGRESS SOUGHT TO ENSURE THAT THE COPYRIGHT OFFICE WOULD NOT BE A BARRIER TO A COPYRIGHT OWNER'S RIGHT TO TIMELY JUDICIAL RELIEF AGAINST INFRINGERS

A. This Court's Longstanding Presumption In Its *Washingtonian* Opinion Forecloses Respondents' Interpretation.

Congress enacted the Copyright Act of 1976 against the backdrop of this Court's decision in *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30 (1939), which established a strong presumption in favor of interpreting the Copyright Act to preserve a copyright owner's exclusive rights.

In *Washingtonian*, the Court addressed the requirements for filing an infringement suit under an earlier statutory framework, the Copyright Act of 1909. *See* 306 U.S. at 36-42. The defendant in *Washingtonian*, an alleged infringer of magazine articles, argued that the plaintiff's suit could not proceed because the plaintiff had not deposited copies of the articles "promptly" with the Copyright Office, as required under that earlier statute, but instead had waited until 14 months after publication. *See id.* at 35-36. Although the plaintiff deposited the required copies before filing suit, the defendant maintained that plaintiff's delay foreclosed the action. *See id.* at 39.

The Court rejected that argument. Observing that "promptly" was not defined in the 1909 Act, the Court

declared that "forfeiture[]" of a copyright owner's right to sue is "never to be inferred from doubtful language." *Id.* at 42. Although there were "[p]lausible arguments" for the defendant's reading of the statute, mere plausibility was not enough to preclude copyright owners from enforcing their exclusive rights, the value of which "depended upon the possibility of enforcement." *Id.* at 39.

Congress was aware of the *Washingtonian* decision in crafting the 1976 Act,[6] and legislated against the backdrop of *Washingtonian*'s clear-statement rule in enacting section 411(a). *Cf. Am. Broad. Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2505 (2014) (interpreting other provisions of the 1976 Copyright Act enacted by Congress in response to this Court's decisions in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974)).

Here, where the language of the statute as a whole supports Petitioner's reading, it would be especially unfaithful to Congress' purpose to read into section 411(a) a forfeiture of the essential rights of copyright on account of administrative delay by the Copyright Office. Such an encroachment on a copyright owner's intellectual property is neither mandated by section 411(a)'s text nor consistent with the Act's overall structure or purpose. As in *Washingtonian*, the Court should instead interpret section 411(a) to preserve the

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[6] *See, e.g.*, Copyright Law Revision, Hrg. Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 89th Cong., 1st Sess., at 101 (Aug. 1965) (statement of John Schulman, Chairman for Revision of Copyright Law, American Bar Association) (discussing *Washingtonian*).

ability of copyright owners to enforce their exclusive rights. *See* 306 U.S. at 42.

B. Congress' Rejection Of A Pre-Suit Mandamus Requirement In The 1976 Act Validates Petitioner's Reading.

In the Copyright Act of 1909, Congress had provided that "[n]o action or proceeding shall be maintained for infringement of copyright in any work until" the statute's requirements for "deposit of copies and registration of such work have been complied with." 17 U.S.C. § 12 (1939). Some courts interpreted this precursor to section 411(a) as barring a copyright owner from suing for infringement if the Copyright Office refused to register the work (or works) at issue, including the Second Circuit in *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637, 640-41 (2d Cir. 1958). Under the rationale of *Vacheron*, a copyright owner was required to first bring a separate mandamus action against the Register to compel issuance of a certificate of registration before filing an infringement action. *See id.*

Congress paid close attention to the *Vacheron* outcome in crafting the 1976 Act. A study on copyright registration authorized by Congress to aid in overhauling the Copyright Act, explained that *Vacheron* "appear[ed] to go the whole way in holding that the plaintiff cannot maintain an infringement action without having procured a registration certificate." Benjamin Kaplan, *Study No. 17—The Registration of Copyright* at 31 n.* (Aug. 1958). Professor Kaplan expressed concern with such an approach: "Surely [the

prerequisite of deposit and registration] cannot mean that a claimant is altogether barred from an infringement action where the Register has wrongfully refused to issue a certificate; for it is agreed that the Register's determination is not conclusive." *Id.*

Congress responded to this concern by "alter[ing] the [then-] present law as interpreted in [*Vacheron*]." H.R. Rep. No. 94-1476, at 157 (citing *Vacheron*, 260 F.2d at 237). To ensure that copyright owners would not lose valuable rights as a consequence of the Copyright Office's administrative role, the 1976 Act altered the 1909 Act rule by expressly permitting copyright owners to sue for infringement without a certificate in hand. *See* 17 U.S.C. § 411(a); *see also* H.R. Rep. No. 94-1476, at 157. The effective date of registration was established as the date on which the required application, deposit of the work, and fee were submitted to the Office, as determined either by the Register or "a court of competent jurisdiction." 17 U.S.C. § 410(d). With these changes, Congress intended to address not only "the possibility that a court might later find the Register wrong in refusing registration," but also "the inevitable timelag between receipt of the application and other material and the issuance of [a] certificate." *See* H.R. Rep. No. 94-1476, at 157; S. Rep. No. 94-473, at 139.

Congress' rejection of the *Vacheron* approach underscores the considered judgment that the Copyright Office is not a gatekeeper for the judicial enforcement of copyrights. Although the Copyright Office plays an important role in administering the Copyright Act, its function regarding registration is a limited one. Unlike the Patent Office, the Copyright Office does not

compare or assess the work deposited against prior material. As explained by Professor Kaplan in reporting to Congress, "the [copyright] examiner does not and cannot investigate at large .... He is certainly not expected to check whether the work duplicates a previously copyrighted work or a work in the public domain." Kaplan at 35; *see* Caruthers Berger, *Study No. 18—Authority of the Register of Copyrights to Reject Applications for Registration*, at 94 (Mar. 1959) ("The functions of the Register in regard to the registration of claims may be characterized as ministerial."); *see also, e.g.*, Compendium of U.S. Copyright Office Practices §§ 309.1 (Office "will not compare the deposit copy(ies) with other works" in determining whether a work is copyrightable); 309.2 ("Ordinarily, the Office will not conduct its own factual investigation to confirm the truth of the statements made in the application.").

III. RESPONDENTS' RULE WOULD DENY COPYRIGHT OWNERS MEANINGFUL PROTECTION OF THEIR STATUTORY RIGHTS

A. The Copyright Office Typically Takes Months And Sometimes Years To Carry Out Its Administrative Function And Issue A Certificate.

Due to the human and technological constraints of the Copyright Office, the gap between when a copyright owner submits its registration materials to the Office and the Office's issuance of a certificate of registration is significant—a span of seven to nine months on average and more than two years in some

instances. *See* U.S. Copyright Office, *Registration Processing Times*, https://www.copyright.gov/registration/docs/processing-times-faqs.pdf (accessed Aug. 31, 2018). As noted above, Congress recognized a "time-lag" in the registration function when it enacted the 1976 Act, H.R. Rep. No. 94-1476, at 157, and delays remain "a source of constant concern" today. *Oversight of the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 8-9 (2014) (statement of Maria Pallante, Register of Copyrights).

The lag time has been increasing in recent years. Between 2012 and 2015, the average processing time from online submission to issuance of a certificate rose from 3.1 months to 4.4 months, while the average processing time for paper submissions rose from 4.8 months to 13.5 months. *FY 2016 Appropriations Questions for the Record*, H. Comm. on Appropriations (Mar. 10, 2015). The current processing of online submissions averages from seven to nine months and for paper submissions is from nine to 16 months. *See Registration Processing Times, supra*, at 1. Consistent with this trend, the Copyright Office began fiscal year 2016 with 249,000 open claims in the online registration system but ended the year with more than 316,000 claims in the system. *See Fiscal 2016 Annual Report*, Copyright Office, https://www.copyright.gov/reports/annual/2016/ar2016.pdf.

Amici's members experience these delays firsthand. Music publishers and record companies expend significant resources to register copyrights for musical works and sound recordings, which constitute

the core assets of and sources of income for the creators they represent. Individual songwriters and composers, as well, need to register their works to ensure enforceability of their copyrights. And the wait from the time of submission to issuance of certificate can be daunting. In the experience of *Amici*'s members, delays of a year or more are not uncommon.

To cite recent examples, on April 11, 2017, a music publisher submitted its registration materials for a musical work written by Justin Timberlake and four other songwriters titled "Hair Up." *See* Copyright Office, Case No. 1-4853126911.[7] Although the registration submission included the required payment, deposit of the work, and application, the Office still has not issued a certificate of registration or refused to do so—a delay of 14 months and counting. Similarly, registration materials for a musical work titled "#1 Record for Christmas" by Neil Diamond were submitted to the Copyright Office on February 2, 2017, with all of the statutory requirements completed on that date. *See* Copyright Office, Case No. 1-4399057193. The certificate of registration has yet to be issued—a delay of more than 16 months.

Indeed, the administrative delay at the Copyright Office sometimes exceeds the three-year limitations period to sue for infringement, and could eliminate a

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[7] All references to matters pending before the Copyright Office are based on records from the Office's eCO electronic registration system.

copyright owner's right to sue altogether if Respondents' interpretation of section 411(a) were adopted.[8] For instance, a music publisher submitted its application and fee for "Just Another Dude," a musical work by David Julca and three other songwriters, on August 17, 2015, and submitted the deposit required by section 408(a) shortly thereafter. Nevertheless, more than three years later, neither a certificate nor a refusal has issued. *See* Copyright Office, Case No. 1-2645541581.

Amici's members who register sound recordings report similar experiences. Depending upon whether the sound recording deposit is provided in a digital or physical format, the typical delay for issuance of a certificate ranges from five to 11 months, but—as in the case of musical works—can sometimes exceed three years. The wait time with respect to the album art accompanying a physical product, which is also eligible for registration, can be lengthier than that for the music.

Although the Copyright Office offers a "special handling" procedure for an added fee to expedite its administrative function, that does not solve the problem. The "special handling" accommodation is not a statutory requirement, but rather a voluntary procedure implemented by the Office and made available "at the discretion of the Register of Copyrights in a limited number of cases." *Policy Decision Announcing Fee for Special Handling of Applications for Copyright Registration*, 47 Fed. Reg. 19,254 (May 4, 1982); *see*

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[8] "No civil action shall be maintained under the provisions of [Title 17] unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b).

also Copyright Office Compendium § 623.2 (special handling request may be denied). The Copyright Office may refuse a "special handling" request if it deems the request insufficiently justified or simply because it lacks the capacity based on workload to expedite the process. *Copyright Office Compendium* § 623.2. Moreover, the procedure does not ensure that a copyright owner will receive a response within a particular time; the Office attempts to process expedited requests within five working days, but it expressly disclaims any guarantee that it will meet that target and is not under any obligation to do so. *See id.* § 623.4.

The fee for "special handling" (which is in addition to the regular registration fee) is currently $800, and the Copyright Office recently proposed to raise it to $1,000. 83 Fed. Reg. 24,054, 24,060 (May 24, 2018). In the current online environment, digital song files can be readily and rapidly distributed without authorization to others via the Internet. A single infringer may be infringing hundreds or even thousands of works of a record company or music publisher, many of them still awaiting a registration certificate. "Special handling" may be prohibitively expensive in such a case. Moreover, the cost of paying an additional $800 or $1000 per registration to file suit for an injunction may be beyond the reach of smaller publishers or labels, to say nothing of individual music creators. But even if it is feasible for a copyright owner to pay the required fees, the Copyright Office may lack the capacity to handle a large number of requests in an expedited fashion.

B. To Delay For Months Or Years A Copyright Owner's Right To Seek Injunctive Or Other Judicial Relief Effectively Abrogates That Right.

The right of a copyright owner to seek judicial relief against infringement is perhaps the most fundamental right recognized under copyright law. Since at least 1710, with the Statute of Anne, the first English copyright statute, copyright owners have been afforded the right to sue for infringement of their works. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349-50 (1998). In the United States, this right has been recognized since before the adoption of the Constitution, and it has been part of federal copyright law since the first federal copyright statute, the Copyright Act of 1790. *See id.* The need to afford copyright owners the right to seek judicial relief is obvious—a copyright lacks value if its creator cannot enforce it through the courts against infringers. *See Washingtonian*, 306 U.S. at 40 ("Without right of vindication a copyright is valueless."). Injunctive relief against ongoing infringement is particularly significant to protect the exclusivity of a copyright. *See* 17 U.S.C. § 502(a) (court may award injunction to "prevent or restrain infringement of a copyright").

Congress enacted section 411(a) and other provisions of the Act as incentives for copyright owners to register their works under a voluntary system and to ensure a flow of deposit materials to the Library of Congress. *See* H.R. Rep. No. 94-1476, at 150 (finding that the 1976 Act's various "increased inducements for voluntary registration and deposit" would result in

"a more effective deposit system" for the Library of Congress). The incentives include the ability to seek legal redress against infringers, a *prima facie* presumption of validity of a copyright in litigation, and entitlement to statutory damages and attorneys' fees. *See* 17 U.S.C. §§ 410-12. In providing such incentives, Congress did not mean to defeat copyright owners' right to sue for infringement. A reading of the statute that permits the filing of an action once the required registration materials have been submitted by the owner to the Copyright Office is fully consistent with Congress' objectives, as a copyright owner has no less an incentive (and in fact may have a greater incentive) to register its works due to the availability of suit. *See Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 620 (9th Cir. 2010) (goal of registration "is accomplished equally by the registration and application approach").

On the other hand, to delay the right to sue infringers until issuance or refusal of a certificate by the Copyright Office would curtail, and in some cases eliminate, for no discernable reason, a copyright owner's ability to enforce its exclusive rights. As a leading commentator has explained, such a rule would consign copyright owners to a "legal limbo" while they wait for an under-resourced agency to take action. 2 Nimmer on Copyright § 7.16[B][3][b][ii]. This scenario makes no sense in light of the overall design and purpose of the 1976 Act. *See United States v. Hayes*, 555 U.S. 415, 426 (2009) (relying on "[p]ractical considerations" in interpreting statute).

For music creators and owners, such an approach is particularly pernicious because digital piracy of musical works and sound recordings works is especially prevalent at the time of initial release. At the same time, this is the period during which a work may have its highest earning potential. The inability to seek an injunction until the Copyright Office is able to act deprives music copyright owners of the most basic right of a copyright owner to protect its works against infringement.

Section 411(a) should not be read "in a vacuum" but in context and "with a view to [its] place in the overall statutory scheme." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012). As demonstrated by the statutory text and confirmed by the structure, purpose, and legislative record of the 1976 Copyright Act, an interpretation of section 411(a) that diminishes copyright owners' exclusive rights by undermining the ability to enforce them in court is not only misguided, but the opposite of what Congress intended and enacted as law.

CONCLUSION

For the foregoing reasons, the Eleventh Circuit's judgment should be reversed.

Respectfully submitted.

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September 4, 2018

APPENDIX: DESCRIPTIONS AND INTERESTS OF *AMICI CURIAE*

1. The National Music Publishers' Association (NMPA) is the principal trade association representing the U.S. music publishing and songwriting industry. Over the last 100 years, NMPA has served as a leading voice representing American music publishers before Congress, in the courts, within the music, entertainment, and technology industries, and to the listening public. NMPA's membership includes major music publishers affiliated with record labels and large entertainment companies as well as independently owned and operated music publishers of all catalog and revenue sizes. Compositions owned or controlled by NMPA's hundreds of members account for the vast majority of musical works licensed for commercial use in the United States

2. The Recording Industry Association of America (RIAA) is a nonprofit trade organization representing the American recording industry. RIAA supports and promotes the creative and financial vitality of the major recorded music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture, and/or distribute approximately 85 percent of all legitimate recorded music produced and sold in the United States. In support of its members, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conducts consumers consumer, industry, and technical research; and monitors and reviews state and federal laws, regulations, and policies. The

RIAA protects the ability of the music business to invest in new brands and new music and, in the digital arena, to give online services space to continue to prosper.

3. The American Society of Composers, Authors and Publishers (ASCAP), the first performing rights organization (PRO) in the United States, was formed in 1914 at the behest of composing legends Victor Herbert, Irving Berlin, and John Phillip Sousa. Its mission is to enable American music authors to receive fair remuneration for the public performance of their works. ASCAP's over 670,000 songwriters, lyricists, composers, music publishers, and foreign society members grant the society a nonexclusive right to license public performances of their works. As a PRO, ASCAP offers blanket licenses to a wide variety of users and also engages in enforcement efforts to protect its members' copyrights.

4. Broadcast Music, Inc. (BMI), a global leader in music rights management, was founded in 1939 by forward-looking thinkers who wanted to represent songwriters in emerging genres such as jazz, blues, and country, and to protect the public performances of their music. BMI represents the public performance rights in nearly 13 million musical works created and owned by more than 800,000 songwriters, composers and publishers. As a PRO, the company negotiates music license agreements for the public performance of nondramatic musical works and distributes the fees it generates as royalties to its affiliated writers and publishers. BMI also serves as advocate for the value of music, representing its members' interests in the courts and to Congress.

5. The Nashville Songwriters Association International (NSAI) is the world's largest not-for-profit trade association advocating for the interests of songwriters, with approximately 5,000 members and 100 chapters in the United States and ten other countries. Founded in 1967 by Eddie Miller, Marijohn Wilkin, Kris Kristofferson, Felice and Boudleaux Bryant, Liz and Casey Anderson, and others, NSAI is dedicated to protecting the rights of songwriters in all genres of music and addressing needs unique to the songwriting profession. In addition to its legal and legislative advocacy work, NSAI offers programs and services designed to provide education and career opportunities for songwriters at every level. It also owns The Bluebird Cafe, a legendary songwriter performance venue in Nashville, Tennessee.

6. Songwriters of North America (SONA) is a grassroots advocacy organization founded in 2015 by songwriting partners and co-executive directors Michelle Lewis and Kay Hanley to advocate for the rights of songwriters in the digital age. A fast-growing organization, SONA has a membership of over 650 full-time, professional songwriters who devote their extra time and energy to the defense of their creative intellectual property before the courts and in Congress. SONA has played a leading role in challenging unfairness to songwriters under current U.S. music licensing laws and advocating for comprehensive legislation to create a more modern and balanced licensing system, currently pending before Congress.